

ESTTA Tracking number: **ESTTA551969**

Filing date: **08/02/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209194
Party	Defendant 5 Continent, Inc.
Correspondence Address	FRANK S FARRELL F S FARRELL LLC 7101 YOURK AVENUE SOUTH, SUITE 153 EDINA, MN 55435 UNITED STATES frank@fsfarrell.com, alexander@fsfarrell.com
Submission	Motion for Summary Judgment
Filer's Name	Alexander Farrell
Filer's e-mail	alexander@fsfarrell.com
Signature	/s/ Alexander Farrell
Date	08/02/2013
Attachments	5 Continent Motion.pdf(156064 bytes ) 5 Continent Memorandum of Law.pdf(354986 bytes ) Garamella declaration.pdf(165672 bytes ) Exhibit A to Garamella Dec.pdf(954379 bytes ) Farrell declaration.pdf(158424 bytes ) Exhibit A to Farrell Dec.pdf(570868 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of:  
Application Serial No. 85/690,558  
For the mark: PUCKMASTER  
Published in the Official Gazette on January 8, 2013

Puckmaster, LLC,

Opposer,

Opposition No. 91209194

v.

5 Continent Inc.,

Applicant

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE Pursuant to Fed. R. Civ. P. 56 or in the alternative Rule 12(b)(6)

Applicant 5 Continent, Inc. respectfully seeks: Summary Judgment dismissing Opposer

Puckmaster LLC's opposition to Applicant's mark "PUCKMASTER" Application Serial No.

85/690,558, refusing registration to Opposer's Application Serial No. 85/693,281, and issuance of the trademark "PUCKMASTER" to Applicant.

This Motion is based upon this Notice, the accompanying Memorandum of Points and Authorities, all pleadings and papers filed in this action, and upon such other matters as may be presented to the Board if the Board elects to hold a hearing.

Dated: August 2<sup>nd</sup>, 2013

By: /s/ Frank S. Farrell

**F.S. FARRELL, LLC**  
Frank S. Farrell (MN #28447)  
Alexander J. Farrell (MN #390202)  
7401 Metro Blvd, Suite 425

Edina, MN 55439  
Telephone: (952) 921-3260  
frank@fsfarrell.com  
alexander@fsfarrell.com

**ATTORNEYS FOR APPLICANT 5  
CONTINENT**

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**MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY  
JUDGMENT OF OPPOSER'S CLAIM**

**I. INTRODUCTION**

Pursuant to Fed. R. Civ. P. 56 or in the alternative Rule 12(b)(6) Applicant 5 Continent, Inc., (hereinafter "5 Continent") respectfully moves for Summary Judgment dismissing Opposer Puckmaster LLC's opposition to Applicant's mark PUCKMASTER Reg. No. 85/690,558. Opposer's sole claim in this Opposition proceeding is likelihood of confusion. 5 Continent has a prior intent to use filing for the "PUCKMASTER" mark and thus has a right to preclude Opposer's subsequent intent to use filing for the same mark. Opposer has made some non-specific claims in discovery responses and discussions with 5 Continent's counsel that Opposer believes that 5 Continent does not have a *bona fide* intent to use the mark and that 5 Continent has abandoned the mark. 5 Continent vehemently denies the veracity of these allegations however, for purposes of this motion it is 5 Continent's position that the Board does not need to

address any issue regarding Applicant's *bona fide* intent to use or abandonment. Despite having had knowledge of the claims, ample opportunity to plead, and notice of the requirement to properly plead these matters, Opposer has failed to do so. Based on the record before the Board granting Applicant Summary Judgment is appropriate.

## **II. FACTUAL BACKGROUND**

5 Continent acquired the right to the "PUCKMASTER" mark via purchase of the Puckmaster business by 5 Continent's corporate affiliate on June 26, 2009. Donlyn Capital the seller, and its predecessors have been in the business of making and selling the Puckmaster machines under the "PUCKMASTER" trademark since approximately 1986. (Decl. of Todd Garamella "Garamella Decl." ¶ 4) The Puckmaster machines are large industrial machines which process metal chips and shavings into more easily manageable "pucks". They are useful in an industrial setting where large quantities of metal shavings and debris are created. (Garamella Decl. ¶ 6). A company named Unlimited Horizon Marketing, Inc. had a valid trademark registration Serial No. 74554911 on PUCKMASTER Filed on July 29, 1994 which claimed first use on February 16, 1994. (Garamella Decl. ¶ 7) This trademark registration was cancelled on July 18, 2012 for failure to file a section 8 statement. (Garamella Decl. ¶ 8).

Todd Garamella is an officer of 5 Continent. (Garamella Decl. ¶ 2). Mr. Garamella is also a minority shareholder in Landmark Community Bank N.A. (hereinafter "Landmark"). (Garamella Decl. ¶ 9). In exchange for financing of the Puckmaster business, 5 Continent granted a security interest in the Puckmaster business and assets to both Landmark and Crown Bank (hereinafter "Crown"). (Garamella Decl. ¶ 10). Crown and Landmark executed an intercreditor subordination agreement whereby Landmark received a security interest in an enumerated inventory of Puckmaster component parts and Crown received a security interest in

the remainder of Applicant's Puckmaster business, including the "PUCKMASTER" trademark. Crown subsequently filed a UCC financing statements in 2009 and 2011 perfecting its security interest including the intellectual property and trademarks of Applicant. (See Exhibit A to Garamella Decl.). 5 Continent defaulted on its obligations to Crown in July of 2011. Crown has granted 5 Continent the permission to pursue the "PUCKMASTER" trademark application despite its security interest. (Garamella Decl. ¶ 12).

Landmark removed the inventory identified in its security agreement from 5 Continent in July of 2012. Also, in June of 2012, a computer containing all engineering and mechanical CAD files was stolen from 5 Continent. (Garamella Decl. ¶ 13). Charles Arnold is a former employee of 5 Continent and was responsible for soliciting Puckmaster business. In mid-2012 Mr. Arnold informed Mr. Garamella's son that he had purchased the Puckmaster business from Landmark including all intellectual property and rights to the "PUCKMASTER" trademark. (Garamella Decl. ¶ 14).

By June or July of 2012 Charles Arnold began soliciting business for Puckmaster machines independently and without the permission of 5 Continent, and was fulfilling orders for Puckmaster parts in the possession of Landmark under the name "Puckmaster". (Garamella Decl. ¶ 15). To the best of Mr. Garamella's knowledge, Landmark formed Opposer to take control of the Puckmaster business and improperly take the assets of that business including the "PUCKMASTER" trademark. Mr. Arnold took control of Opposer at the behest of Landmark. (Garamella Decl. ¶ 16).

5 Continent filed an intent to use application for Puckmaster on July 30<sup>th</sup>, 2012 Serial No. 85690558. Opposer filed an intent to use application for Puckmaster on August 2<sup>nd</sup>, 2012 Serial

No. 85693281. Opposer filed this pending Opposition proceeding on the sole ground of likelihood of confusion between the marks.

Crown is currently involved in litigation concerning Crown and Landmark's appropriation of the Puckmaster business and "PUCKMASTER" trademark contrary to 5 Continent's rights and Crown's security interest. This case is filed in Minnesota District Court File No. 27-CV-13-2022. (Garamella Decl. ¶ 17). In addition Landmark has filed an adversary proceeding against Mr. Garamella in a current bankruptcy proceeding, relating to the Puckmaster business. (Garamella Decl. ¶ 18).

### **III. LEGAL STANDARD**

The standard for Summary Judgment under Federal Rule of Civil Procedure 56 is applicable to proceedings before the TTAB. 37 C.F.R. § 2.116(a)(1987). Rule 56(c) provides in pertinent part that summary judgment shall be rendered forthwith if the pleadings and evidence of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

### **IV. ARGUMENT**

5 Continent has a prior intent to use application for the "PUCKMASTER" trademark and is thus entitled to a priority against Opposer. Opposer has alleged in its discovery and in conversations with counsel that 5 Continent never had a *bona fide* intent to use the trademark and secondly that 5 Continent abandoned the mark, 5 Continent disputes both of these claims. However, neither of these claims were raised by Opposer in its pleadings and thus may not be relied upon in this proceeding. Based on these facts, summary judgment is appropriate and 5 Continent should be allowed to go forward with its application for registration of the mark "PUCKMASTER".

**A. Applicant has a prior intent to use Application.**

Section 7(c) of the Lanham Act states that "the filing of an application to register [a trademark] shall ... confer a right of priority, nationwide in effect, ... against any other person except for a person ... who, prior to such filing, has used the mark." 15 U.S.C. § 1057(c).

Before final registration, the Applicant may rely on that priority date in proceedings before the TTAB. See, e.g., *Larami Corp. v. Talk To Me Programs, Inc.*, 36 U.S.P.Q.2d (BNA) 1840 (1995) ("the right of an intent-to-use applicant to rely upon its constructive use date in Board proceedings comes into existence with the filing of its intent-to-use application, and the applicant can rely upon this date in an opposition for purposes of establishing priority"). Federal Courts have permitted an intent-to-use application holder to assert his constructive use to defend an action. *Id.*

Applicant filed an intent to use application on July 30<sup>th</sup>, 2012 Serial No. 85690558. Opposer did not file an intent to use trademark application until August 2<sup>nd</sup>, 2012 Serial No. 85693281. This fact is not in dispute and is clearly established by the records of the USPTO and by Opposer's own admission (Decl. of Frank S. Farrell "Farrell Decl." Exhibit A). Prior filing of an intent to use trademark gives an applicant the right to claim priority. 15 U.S.C. § 1057(c). In this simple test of dates, Applicant 5 Continent secured an earlier filing and thus has the right to proceed with its application.

**B. Opposer has raised no legally enforceable defense to Applicant's prior intent to use filing, counsel has inferred in conversations and discovery that Applicant's mark has become abandoned and that there was no *bona fide* intent to use, but these claims were never raised in Opposer's pleadings.**



Opposer has presented arguments in discovery and conversations with counsel for Applicant that Applicant never had a *bona fide* intent to use the “PUCKMASTER” mark and that Applicant has caused the mark to become abandoned. However, neither of these issues were raised in Opposer’s pleadings. In compliance with Fed. R. Civ. P. 15(a) and TBMP § 507.02 Opposer was obligated to amend its pleadings 21 days after 5 Continent’s responsive pleading or April 9<sup>th</sup>, 2013. Opposer was aware of the purported evidence it has cited to support these contentions prior to April 9<sup>th</sup> deadline, and chose not to raise it.

Pursuant to TBMP § 314 a plaintiff may not rely on an unpleaded claim. It is well settled case law interpreting Fed. R. Civ. P. 15(a), that leave to amend should not be given where there has been a showing of “undue delay”. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Court of Appeals for the Federal Circuit has found that failure of a party to amend pleadings prior to a scheduling deadline is an “entirely reasonable” basis to deny leave to amend. *See McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1357 (Fed.Cir 2001). “[T]he purpose of the pleading is to facilitate a proper decision on the merits.” Where a party fails to raise a claim when it has the opportunity to do so, it is proper to deny leave to amend a party’s pleadings. *Tenneco Resins, Inc. v. Reeves Bros., Inc.*, 752 F.2d 630, 635 (Fed.Cir. 1985) *quoting Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957).

In this matter, counsel for Opposer knew of the grounds for its allegations of lack of *bona fide* intent to use and abandonment well in advance of its deadline to amend and conceivably in advance of its Notice of Opposition. Therefore, Opposer may not seek judgment regarding assertions it has failed to make in a timely manner.

Lack of *bona fide* intent to use at the time of an intent to use filing, and abandonment are grounds that must be alleged in pleadings pursuant to TBMP § 309.03(c). These grounds may

not be relied upon unless included in an Opposer's Pleading or Amended pleading. TBMP § 309.03(c).

Counsel for Opposer James Nikolai, informed counsel for Applicant Frank S. Farrell, on March 15<sup>th</sup> 2013 that it believed 5 Continent did not have a *bona fide* intent to use the mark and that the mark had become abandoned. (Farrell Decl. ¶ 3). Mr. Nikolai, stated that his contentions were based on testimony given by Mr. Garamella in his December 13<sup>th</sup> and 21<sup>st</sup> 2012 bankruptcy deposition. (Farrell Decl. ¶ 4). In order to verify this claim Mr. Farrell purchased a copy of this transcript on March 15<sup>th</sup>, because Mr. Nikolai would not provide a copy of the pages he was referencing. (Farrell Decl. ¶ 5).

Thus, Mr. Nikolai had knowledge of the facts which support his contentions that 5 Continent did not have a *bona fide* intent to use the mark at the time of its filing, and that the mark had become abandoned well in advance of his April 9<sup>th</sup> deadline to amend Opposer's pleadings. Since Mr. Garamella's deposition took place two months before Mr. Nikolai filed his Notice of Opposition, it is reasonable to believe that he had support for his allegations before filing. Yet, Opposer chose not to amend its pleadings to include these allegations. Thus, pursuant to TBMP § 314 Opposer must be barred from asserting them in this action. Opposer's sole claim is likelihood of confusion.

5 Continent vehemently denies that it did not have a *bona fide* intent to use the mark at the time it was filed or at any time since it acquired the Puckmaster business. Further 5 Continent denies that it caused the mark to become abandoned. However, because Opposer was required to plead these matters and chose not to do so, it is not appropriate to allow it to seek judgment based on those assertions.

## **V. CONCLUSION**

Based on the above contentions 5 Continent requests that this opposition be dismissed, that Trademark Application Serial No. 85/693,281 be refused registration and that registration of the trademark "PUCKMASTER be issued to Applicant.

Dated: August 2<sup>nd</sup>, 2013

By: /s/ Frank S. Farrell

### **F.S. FARRELL, LLC**

Frank S. Farrell (MN #28447)

Alexander J. Farrell (MN #390202)

7401 Metro Blvd, Suite 425

Edina, MN 55439

Telephone: (952) 921-3260

frank@fsfarrell.com

alexander@fsfarrell.com

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Opposition No. 91209194

v.

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Applicant

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the following documents:

1. Notice of Motion and Motion for Summary Judgment;
2. Memorandum In Support of Motion for Summary Judgment;
3. Declaration of Todd Garamella and Exhibit;
4. Declaration of Frank S. Farrell and Exhibit; and
5. Certificate of service.

Were served upon James T. Nikolai at Nikolai & Mersereau, P.A. 900 Second Avenue South Suite 1550 Minneapolis, MN 55402, jim.nikolai@nm-iplaw.com by email this 2<sup>nd</sup> Day of August, 2013.

By: /s/ Frank S. Farrell

**F.S. FARRELL, LLC**  
Frank S. Farrell (MN #28447)  
Alexander J. Farrell (MN #390202)  
7401 Metro Blvd, Suite 425  
Edina, MN 55439  
Telephone: (952) 921-3260  
frank@fsfarrell.com  
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I, Todd Jonathon Garamella do hereby declare and state as follows:

1. I make this declaration based on my own knowledge and would testify competently to the matters contained herein.
2. I am an officer of Applicant 5 Continent, Inc. (hereinafter “5 Continent”).
3. I am an officer of Donlyn Manufacturing Minnesota, LLC. On June 26<sup>th</sup>, 2009 Donlyn Manufacturing Minnesota purchased the Puckmaster business and “PUCKMASTER” trademark from Capital Manufacturing, LLC d/b/a Donlyn Capital.
4. Donlyn Capital and its predecessors have conducted the Puckmaster business and used the “PUCKMASTER” mark since approximately 1986.
5. 5 Continent is the assignee of the “PUCKMASTER” trademark.
6. The Puckmaster machines are large industrial machines which process metal chips and shavings into more easily manageable “pucks”. They are useful in an industrial setting where large quantities of metal shavings and debris are created.

7. Unlimited Horizon Marketing, Inc. had a valid trademark registration Serial No. 74554911 on PUCKMASTER Filed on July 29, 1994 which claimed first use on February 16, 1994.

8. This trademark registration was cancelled on July 18, 2012 for failure to file the required paperwork.

9. I am a minority shareholder of Landmark Community Bank, N.A (hereinafter “Landmark”).

10. In exchange for financing of the Puckmaster business, 5 Continent granted a security interest in the Puckmaster business and assets to both Landmark and Crown Bank.

11. Crown Bank and Landmark executed an intercreditor subordination agreement whereby Landmark received a security interest in an enumerated inventory of Puckmaster component parts and Crown received a security interest in the remainder of Applicant’s Puckmaster business, including the intellectual property. Crown Bank subsequently filed a UCC financing statements in 2009 and 2011 perfecting its security interest including the intellectual property and trademarks of Applicant. The intercreditor subordination agreement and Crown Bank’s UCC financing statement are attached as Exhibit A. Exhibit A is a true and correct copy of pages from 5 Continent’s document production in this case identified by Bates numbers 5CON000411-000415.

12. 5 Continent defaulted on its obligations to Crown in July of 2011. Crown has granted 5 Continent the permission to pursue the “PUCKMASTER” trademark application despite its security interest.

13. Landmark removed the inventory identified in its security agreement from 5 Continent in July of 2012. Also in June of 2012, a computer containing all engineering and mechanical CAD files was stolen from 5 Continent.

14. Charles Arnold is a former employee of 5 Continent and was responsible for soliciting Puckmaster business. In mid-2012 Mr. Arnold informed my son, Joseph John Garamella, that he had purchased the Puckmaster business from Landmark including all intellectual property and right to the “PUCKMASTER” trademark.

15. By June or July of 2012 Mr. Arnold began soliciting business for Puckmaster machines independently and without the permission of 5 Continent, and was fulfilling orders for Puckmaster parts in the possession of Landmark under the name “Puckmaster”.

16. To the best of my knowledge, Landmark formed Opposer to take control of the Puckmaster business and improperly take the assets of that business including the “PUCKMASTER” trademark. Mr. Arnold took control of Opposer at the behest of Landmark.

17. Crown Bank is currently involved in litigation concerning Crown Bank and Landmark’s appropriation of the Puckmaster business and “PUCKMASTER” trademark contrary to 5 Continent’s rights and Crown Bank’s security interest. This case is filed in Minnesota District Court File No. 27-CV-13-2022.

18. In addition Landmark has filed an adversary proceeding against 5 Continent in a current bankruptcy proceeding, relating to the Puckmaster business.

19. It is my firm belief and understanding that any claim that 5 Continent did not intend to use the “PUCKMASTER” trademark when it filed its trademark application, or that 5 Continent has in any way abandoned the “PUCKMASTER” trademark is absolutely false. It is also my firm

belief that 5 Continent was in fact using the “PUCKMASTER” trademark when it filed its trademark application.

I declare under penalty of perjury under the laws of the United States of America that the following is true and correct.

Dated: August 2<sup>nd</sup>, 2013

/s/ Todd J. Garamella  
Todd J. Garamella



**EXHIBIT A TO DECLARATION OF TODD J. GARAMELLA**

## INTERCREDITOR SUBORDINATION AGREEMENT

LCB Loan No: 736934  
Debtor Name: 5 Continent Distributing, LLC  
Debtor Address: 160 Green Tree Drive, Suite 101, Dover, DE 19904

WHEREAS, Landmark Community Bank, N.A. ("Lender") and Crown Bank ("Crown") have obtained (or are about to obtain) certain Security Agreements from 5 Continent Distributing, LLC ("Debtor"), and Lender and Crown have filed (or intend to file) a Financing Statement(s) pursuant to the Uniform Commercial Code perfecting security interests in:

- (a) All inventory including all PuckMaster Units more fully described in Exhibit A attached hereto and made a part hereof.

("Collateral") of Debtor; and

WHEREAS, Lender and Crown desire to avoid a conflict of security interests arising from their respective Security Agreements and Financing Statements.

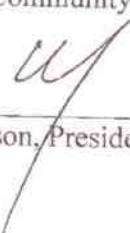
NOW, THEREFORE, it is agreed by and between Lender and Crown as follows:

1. To induce Lender to extend financial accommodations to Debtor, Crown hereby subordinates its security interest in the Collateral to the security interest of Lender.
2. To induce Crown to subordinate its security interest in the Collateral to the security interest of Lender, Lender hereby subordinates its security interest in all of the assets of Debtor other than the Collateral to the security interest of Lender.
3. This Agreement shall remain in effect until it is terminated by written notice by either Lender or Crown. However, termination shall not impair the rights or priorities created by this Agreement and arising prior to the receipt of such notice of termination. This Agreement is solely for the benefit of Lender and Crown and their respective successors and assigns and shall be binding after due execution by Lender and Crown. Neither Debtor or any other persons or entities are intended to be third party beneficiaries hereunder or to have any right, benefit or interest under, or to have any right to enforce, this Agreement.
4. This Agreement is the sole and entire agreement of Lender and Crown with respect to the collateral and any and all prior agreements, discussion, commitment or understanding between Lender and Crown concerning the collateral is superseded by this Agreement. The parties hereto acknowledge that they have read this Agreement and execute it without relying upon any

statements not expressly set forth herein and have obtained such independent legal or other advice as they have decided is necessary.

5. Lender and Crown warrant that the individuals signing below have the requisite legal authority to execute this Agreement on their behalf. This Agreement is only effective with the express consent of Debtor and all borrowers and guarantors of the referenced Lender Loan.

LENDER  
Landmark Community Bank, N.A.

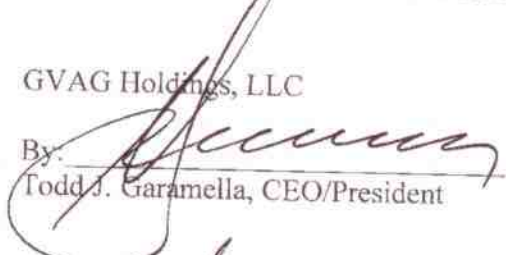
By:   
Kevin Johnson, President

Crown  
Crown Bank

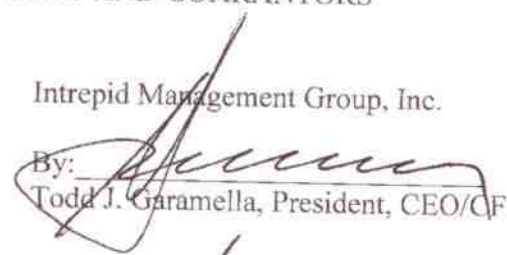
  
Kevin Howk, President

#### CONSENT OF BORROWERS AND GUARANTORS

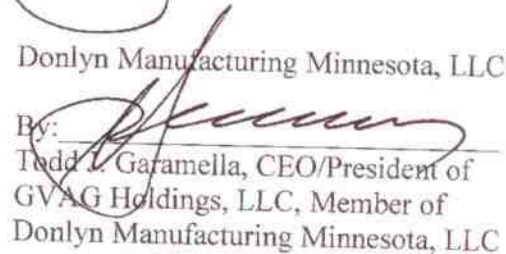
GVAG Holdings, LLC

By:   
Todd J. Garamella, CEO/President

Intrepid Management Group, Inc.

By:   
Todd J. Garamella, President, CEO/CFO

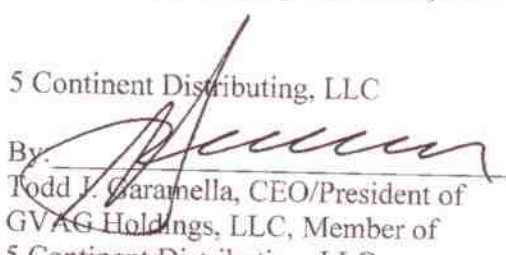
Donlyn Manufacturing Minnesota, LLC

By:   
Todd J. Garamella, CEO/President of  
GVAG Holdings, LLC, Member of  
Donlyn Manufacturing Minnesota, LLC

Superior Engineering Delaware, LLC

By:   
Todd J. Garamella, CEO/President of  
GVAG Holdings, LLC, Member of  
Superior Engineering Delaware, LLC

5 Continent Distributing, LLC

By:   
Todd J. Garamella, CEO/President of  
GVAG Holdings, LLC, Member of  
5 Continent Distributing, LLC

  
Todd J. Garamella

5 Continent Distributing, LLC  
PuckMaster Machines

Model #	Serial #	Quantity	Description
225H	225-10-1066	1	PuckMaster
300	300-10-1067	1	PuckMaster
1622	1622-10-1072	1	PuckMaster Shreader
275	275-10-1060	1	PuckMaster
175	175-10-1062	1	PuckMaster
175	175-10-1063	1	PuckMaster with Allen Bradley PC-550 Control
225	225-10-1064	1	PuckMaster
LT-250	250-10-1061	1	PuckMaster
1616	1616-10-1070	1	PuckMaster Shreader
1622	1622-10-1069	1	PuckMaster SESA Shreader
1622	1622-10-1068	1	PuckMaster SESA Shreader



# UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)

B. SEND ACKNOWLEDGMENT TO: (Name and Address)

CROWN BANK  
601 MARQUETTE AVENUE S., STE. 125  
MINNEAPOLIS, Minnesota 55402

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME <b>5 CONTINENT DISTRIBUTING, LLC</b>				
OR				
1b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
1c. MAILING ADDRESS <b>5041 GREEN FARMS ROAD</b>		CITY <b>EDINA</b>	STATE <b>MN</b>	POSTAL CODE <b>55436</b>
				COUNTRY <b>USA</b>
1d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	1e. TYPE OF ORGANIZATION <b>Limited Liability Company</b>	1f. JURISDICTION OF ORGANIZATION <b>Minnesota</b>	
			1g. ORGANIZATIONAL ID #, if any <input type="checkbox"/> NONE	

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or combine names

2a. ORGANIZATION'S NAME				
OR				
2b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
				COUNTRY
2d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	
			2g. ORGANIZATIONAL ID #, if any <input type="checkbox"/> NONE	

3. SECURED PARTY'S NAME (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME <b>CROWN BANK</b>				
OR				
3b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
3c. MAILING ADDRESS <b>6600 France Avenue South Ste 125</b>		CITY <b>Edina</b>	STATE <b>MN</b>	POSTAL CODE <b>55435</b>
				COUNTRY <b>USA</b>

4. This FINANCING STATEMENT covers the following collateral: All of the following which Debtor owns now or in the future, together with all parts, accessories, repairs, replacements, improvements, and accessions, and wherever located: INVENTORY: All inventory held for ultimate sale or lease, or which has been or will be supplied under contracts of service, or which are raw materials, work in process, or materials used or consumed in Debtor's business. EQUIPMENT: All equipment including, but not limited to, machinery, vehicles, furniture, fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and record keeping equipment, parts, and tools. The property includes any equipment described in a list or schedule Debtor gives to Secured Party, but such a list is not necessary to create or perfect a valid security interest in all of Debtor's equipment. ACCOUNTS AND OTHER RIGHTS TO PAYMENT: All rights to payments, whether or not earned by performance, including, but not limited to, payment for property or services sold, leased, rented, licensed, or assigned. This includes any rights and (CONTINUED)

5. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> LESSEE/LESSOR <input type="checkbox"/> CONSIGNEE/CONSIGNOR <input type="checkbox"/> BAILEE/BAILOB <input type="checkbox"/> SELLER/BUYER <input type="checkbox"/> AG. LIEN <input type="checkbox"/> NON-UCC FILING				
6. <input type="checkbox"/> This FINANCING STATEMENT is to be filed (for record) (for recording) in the REAL ESTATE RECORDS. Attach Addendum (if applicable) 7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (optional) <input type="checkbox"/> All Debtors <input type="checkbox"/> Debtor 1 <input type="checkbox"/> Debtor 2				
8. OPTIONAL FILER REFERENCE DATA				

# UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

## 9. NAME OF FIRST DEBTOR (1a or 1b) ON RELATED FINANCING STATEMENT

9a. ORGANIZATION'S NAME		
OR 5 CONTINENT DISTRIBUTING, LLC		
9b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME, SUFFIX

## 10. MISCELLANEOUS:

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

## 11. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - Insert only one name (11a or 11b) - do not abbreviate or combine names

11a. ORGANIZATION'S NAME				
OR				
11b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	
11c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY
11d. TAX ID #: SSN OR EIN	ADD'L INFO RE ORGANIZATION DEBTOR	11e. TYPE OF ORGANIZATION	11f. JURISDICTION OF ORGANIZATION	11g. ORGANIZATIONAL ID #, if any
				<input type="checkbox"/> NONE

## 12. ☐ ADDITIONAL SECURED PARTY'S or ☐ ASSIGNOR S/P'S NAME - Insert only one name (12a or 12b)

12a. ORGANIZATION'S NAME				
OR				
12b. INDIVIDUAL'S LAST NAME	FIRST NAME	MIDDLE NAME	SUFFIX	
12c. MAILING ADDRESS		CITY	STATE	POSTAL CODE COUNTRY

13. This FINANCING STATEMENT covers ☐ timber to be cut or ☐ as-extracted collateral, or is filed as a ☐ fixture filing.

14. Description of real estate:

15. Additional collateral description:

interests (including all liens) which Debtor may have by law or agreement against any account debtor or obligor of Debtor. GENERAL INTANGIBLES: All general intangibles including, but not limited to, tax refunds, patents and applications for patents, copyrights, trademarks, trade secrets, good will, trade names, customer lists, permits and franchises, payment intangibles, computer programs and all supporting information provided in connection with a transaction relating to computer programs, and the right to use Debtor's name.

16. Name and address of a RECORD OWNER of above-described real estate (if Debtor does not have a record interest):

17. Check only if applicable and check only one box.

Debtor is a ☐ Trust or ☐ Trustee acting with respect to property held in trust or ☐ Decedent's Estate

18. Check only if applicable and check only one box.

☐ Debtor is a TRANSMITTING UTILITY

☐ Filed in connection with a Manufactured Home Transaction -- effective 30 years

☐ Filed in connection with a Public Finance Transaction -- effective 30 years

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of:  
Application Serial No. 85/690,558  
For the mark: PUCKMASTER  
Published in the Official Gazette on January 8, 2013

Puckmaster, LLC,

Opposer,

Opposition No. 91209194

v.

5 Continent Inc.,

Applicant

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I, Frank S. Farrell do hereby declare and state as follows:

1. I make this declaration based on my own knowledge and would testify competently to the matters contained herein.
2. I am lead counsel for Applicant 5 Continent Inc., (hereinafter “5 Continent”).
3. On March 15<sup>th</sup>, 2013 Counsel for Opposer James Nikolai, informed me in a phone conversation that his client’s position was that 5 Continent did not have a *bona fide* intent to use the mark and that the mark had become abandoned.
4. Mr. Nikolai, stated that his contentions were based on testimony given by Todd Garamella in his December 13<sup>th</sup> and 21<sup>st</sup> 2012 bankruptcy deposition BKY 12-44067.
5. In order to verify this claim I purchased a copy of this transcript on March 15<sup>th</sup>, because Mr. Nikolai would not agree to provide me a copy of the pages he was referencing.

6. Attached as Exhibit A to this declaration are true and correct copies of pages from Opposer's document production in this case identified by Opposer's Bates numbers PUC000214-217 and PUC 000258-262.

I declare under penalty of perjury under the laws of the United States of America that the following is true and correct.

Dated: August 2<sup>nd</sup>, 2013

/s/ Frank S. Farrell  
Frank S. Farrell



**EXHIBIT A TO DECLARATION OF FRANK S. FARRELL**

## Trademark Snap Shot Publication Stylesheet

(Table presents the data on Publication Approval)

### OVERVIEW

SERIAL NUMBER	85690558	FILING DATE	07/30/2012
REG NUMBER	0000000	REG DATE	N/A
REGISTER	PRINCIPAL	MARK TYPE	TRADEMARK
INTL REG #	N/A	INTL REG DATE	N/A
TM ATTORNEY	GALAN, MATTHEW	L.O. ASSIGNED	113

### PUB INFORMATION

RUN DATE	11/29/2012		
PUB DATE	N/A		
STATUS	680-APPROVED FOR PUBLICATION		
STATUS DATE	11/28/2012		
LITERAL MARK ELEMENT	PUCKMASTER		
DATE ABANDONED	N/A	DATE CANCELLED	N/A
SECTION 2F	NO	SECTION 2F IN PART	NO
SECTION 8	NO	SECTION 8 IN PART	NO
SECTION 15	NO	REPUB 12C	N/A
RENEWAL FILED	NO	RENEWAL DATE	N/A
DATE AMEND REG	N/A		

### FILING BASIS

FILED BASIS		CURRENT BASIS		AMENDED BASIS	
1 (a)	NO	1 (a)	NO	1 (a)	NO
1 (b)	YES	1 (b)	YES	1 (b)	NO
44D	NO	44D	NO	44D	NO
44E	NO	44E	NO	44E	NO
66A	NO	66A	NO		
NO BASIS	NO	NO BASIS	NO		

### MARK DATA

STANDARD CHARACTER MARK	YES
LITERAL MARK ELEMENT	PUCKMASTER

PUC000214

MARK DRAWING CODE	4-STANDARD CHARACTER MARK
COLOR DRAWING FLAG	NO
<b>CURRENT OWNER INFORMATION</b>	
PARTY TYPE	10-ORIGINAL APPLICANT
NAME	5 Continent, Inc.
ADDRESS	Suite 700 5775 Wayzata Boulevard Minneapolis, MN 55416
ENTITY	03-CORPORATION
CITIZENSHIP	Minnesota
<b>GOODS AND SERVICES</b>	
INTERNATIONAL CLASS	007
DESCRIPTION TEXT	Industrial compacting machines for processing of metal chips and shavings

<b>GOODS AND SERVICES CLASSIFICATION</b>							
INTERNATIONAL CLASS	007	FIRST USE DATE	NONE	FIRST USE IN COMMERCE DATE	NONE	CLASS STATUS	6-ACTIVE

<b>MISCELLANEOUS INFORMATION/STATEMENTS</b>	
CHANGE IN REGISTRATION	NO
PSEUDO MARK	PUCK MASTER

<b>PROSECUTION HISTORY</b>				
DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM
11/28/2012	CNSA	P	APPROVED FOR PUB - PRINCIPAL REGISTER	005
11/27/2012	DOCK	D	ASSIGNED TO EXAMINER	004
08/09/2012	MPMK	O	NOTICE OF PSEUDO MARK MAILED	003
08/08/2012	NWOS	I	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	002
08/02/2012	NWAP	I	NEW APPLICATION ENTERED IN TRAM	001

<b>CURRENT CORRESPONDENCE INFORMATION</b>	
ATTORNEY	Benjamin C. Armitage

CORRESPONDENCE ADDRESS	BENJAMIN C. ARMITAGE CLISE, BILLION & CYR, P.A. 605 HIGHWAY 169 N STE 300 MINNEAPOLIS, MN 55441-6454
DOMESTIC REPRESENTATIVE	Benjamin C. Armitage

# PUCKMASTER

# Trademark/Service Mark Application, Principal Register

Serial Number: 85693281

Filing Date: 08/02/2012

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85693281
MARK INFORMATION	
*MARK	<a href="#">PUCKMASTER</a>
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	PUCKMASTER
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Puckmaster LLC
*STREET	220 S. 6th St. #1950
*CITY	Minneapolis
*STATE (Required for U.S. applicants)	Minnesota
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	55402
LEGAL ENTITY INFORMATION	
TYPE	limited liability company
STATE/COUNTRY WHERE LEGALLY ORGANIZED	Minnesota
GOODS AND/OR SERVICES AND BASIS INFORMATION	
INTERNATIONAL CLASS	007

PUC000258

<b>*IDENTIFICATION</b>	Industrial machines for the processing of metal chips and shavings
<b>FILING BASIS</b>	SECTION 1(b)
<b>ATTORNEY INFORMATION</b>	
<b>NAME</b>	James T. Nikolai
<b>FIRM NAME</b>	Nikolai & Mersereau, P.A.
<b>INTERNAL ADDRESS</b>	Suite 820
<b>STREET</b>	900 Second Avenue South
<b>CITY</b>	Minneapolis
<b>STATE</b>	Minnesota
<b>COUNTRY</b>	United States
<b>ZIP/POSTAL CODE</b>	55402
<b>PHONE</b>	(612) 339-7461
<b>FAX</b>	(612) 349-6556
<b>EMAIL ADDRESS</b>	jim@nm-iplaw.com
<b>AUTHORIZED TO COMMUNICATE VIA EMAIL</b>	No
<b>CORRESPONDENCE INFORMATION</b>	
<b>NAME</b>	James T. Nikolai
<b>FIRM NAME</b>	Nikolai & Mersereau, P.A.
<b>INTERNAL ADDRESS</b>	Suite 820
<b>STREET</b>	900 Second Avenue South
<b>CITY</b>	Minneapolis
<b>STATE</b>	Minnesota
<b>COUNTRY</b>	United States
<b>ZIP/POSTAL CODE</b>	55402
<b>PHONE</b>	(612) 339-7461
<b>FAX</b>	(612) 349-6556
<b>EMAIL ADDRESS</b>	jim@nm-iplaw.com
<b>AUTHORIZED TO COMMUNICATE VIA EMAIL</b>	No
<b>FEE INFORMATION</b>	
<b>NUMBER OF CLASSES</b>	1

<b>FEE PER CLASS</b>	325
<b>*TOTAL FEE DUE</b>	325
<b>*TOTAL FEE PAID</b>	325
<b>SIGNATURE INFORMATION</b>	
<b>SIGNATURE</b>	/james t nikolai/
<b>SIGNATORY'S NAME</b>	James T. Nikolai
<b>SIGNATORY'S POSITION</b>	Attorney of record, Minnesota bar member
<b>DATE SIGNED</b>	08/02/2012

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## **Trademark/Service Mark Application, Principal Register**

**Serial Number: 85693281**

**Filing Date: 08/02/2012**

### **To the Commissioner for Trademarks:**

**MARK:** PUCKMASTER (Standard Characters, see [mark](#))

The literal element of the mark consists of PUCKMASTER.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Puckmaster LLC, a limited liability company legally organized under the laws of Minnesota, having an address of

220 S. 6th St. #1950

Minneapolis, Minnesota 55402

United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 007: Industrial machines for the processing of metal chips and shavings

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

The applicant's current Attorney Information:

James T. Nikolai of Nikolai & Mersereau, P.A.

Suite 820

900 Second Avenue South

Minneapolis, Minnesota 55402

United States

The applicant's current Correspondence Information:

James T. Nikolai

Nikolai & Mersereau, P.A.

Suite 820

900 Second Avenue South

Minneapolis, Minnesota 55402

(612) 339-7461(phone)

(612) 349-6556(fax)

jim@nm-iplaw.com (not authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

### **Declaration**

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

### **Declaration Signature**

Signature: /james t nikolai/ Date: 08/02/2012

Signatory's Name: James T. Nikolai

Signatory's Position: Attorney of record, Minnesota bar member

RAM Sale Number: 9422

RAM Accounting Date: 08/02/2012

Serial Number: 85693281

Internet Transmission Date: Thu Aug 02 10:04:21 EDT 2012

TEAS Stamp: USPTO/BAS-72.25.137.106-2012080210042124

1837-85693281-4903237e6544cc1a1b7e5ab5cb

a83b27a4-DA-9422-20120802094929342836